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No. 93-781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,
Petitioners,

v.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STELLE; GARRIA SPENCER; JAMES FOLSOM, JR., Governor of the State of Alabama; and JIM BENNETT, Secretary of State,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT JAMES FOLSOM, JR., GOVERNOR OF THE STATE OF ALABAMA, IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Where the district court adopts an interim congressional reapportionment plan due to the failure of the state to adopt a valid plan in time for an impending election, is the federal court obligated to defer to a state court as it would to the state legislature with respect to the adoption of a valid congressional reapportionment plan for a subsequent election?

2. Where the district court adopts an interim congressional reapportionment plan due to the failure of the state to adopt a valid plan in time for an impending election, is the state court barred from adopting a valid congressional reapportionment plan for a subsequent election?

PARTIES

The parties in the Court of Appeals are all shown in the Caption.

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BRIEF FOR RESPONDENT JAMES FOLSOM, JR., GOVERNOR OF THE STATE OF ALABAMA, IN SUPPORT OF THE PETITION

OPINIONS BELOW

Respondent James Folsom. Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding the Opinions Below. (Petition for Writ of Certiorari at 1.)

JURISDICTION

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding Jurisdiction. (Petition for Writ of Certiorari at 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding the Constitutional and Statutory Provisions Involved. (Petition for Writ of Certiorari at 2.)

STATEMENT OF FACTS

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the Petitioners' Statement of Facts. (Petition for Writ of Certiorari at 3-11.)

REASONS FOR GRANTING THE WRIT

Respondent Governor James Folsom, Jr. adopts the Reasons for Granting the Writ presented by the petitioners as set forth in their Petition for Writ of Certiorari (Petition for Writ of Certiorari at 12); and in addition, Respondent Folsom states the following:

This Court should grant a Writ of Certiorari because the decision of the court of appeals squarely conflicts with this Court's decision in *Growe v. Emison*, 113 S. Ct. 1075 (1993), which reaffirmed this Court's decisions in *Chapman v. Meier*, 420 U.S. 1 (1975) and *Scott v. Germano*, 381 U.S. 407 (1965).

Growe reaffirmed the proposition that "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman* at 27. *Growe* requires that the federal court defer to the state judiciary as it would to the state legislature with respect to the adoption of a valid reapportionment plan. The decision of the court of appeals directly conflicts with *Growe* because, while acknowl-

edging that the federal court plan may be replaced at any time by a valid plan adopted by the legislature, the court of appeals interpreted *Growe* to mean that a federal court must defer to a state judiciary's efforts to adopt a valid reapportionment plan only if the state judiciary has initiated its efforts *prior* to the adoption of the federal court plan. This clearly contravenes this Court's decision in *Growe*, because *Growe* obligates the federal court to extend to the state judiciary the same "window of opportunity" for the adoption of a valid reapportionment plan that it would extend to the state legislature.

I. UNDER *GROWE v. EMISON*, THE DISTRICT COURT WAS OBLIGATED TO DEFER TO THE STATE COURT AS IT WOULD TO THE STATE LEGISLATURE WITH RESPECT TO THE ADOPTION OF A VALID CONGRESSIONAL REAPPORTIONMENT PLAN.

The central question presented in the instant case is whether the federal court is obligated to defer to the state court, as it would to the state legislature, with respect to congressional redistricting. In light of *Growe*, that question must be answered in the affirmative, because "both state branches" (the state legislature and the state judiciary) are preferred to "federal courts as agents of apportionment." *Growe* at 1081.

Petitioners have correctly argued that "the principal responsibility [for reapportionment] lies with the state," and "the role of the federal judiciary is as a secondary guarantor of voters' constitutional rights." (Petition for Certiorari at 13) (alteration in original). This responsibility is specifically delegated to the states by the United States Constitution. U.S. CONST. art. I, § 2. Consequently, any timely endeavor by the state, whether through its legislature or its judiciary, to fulfill its responsibility to adopt and implement a valid congressional redistricting plan for a future election, should be given proper deference by a federal court.

The principle in *Growe*, which establishes that a federal court should defer to either a state court or a state legislature with respect to reapportionment, is a reaffirmation of the state's fundamental right to address the "highly political task" of designing its own state legislative and congressional districts. *Growe* at 1080. Such deference is due even under circumstances where federal court action precedes timely action by a state court or state legislature, because the state always retains the primary responsibility for reapportionment. See *Id.* at 1081. ("[T]he primacy of the state in designing those districts compels a federal court to defer.").

The district court acknowledged the state's retention of the primary responsibility for reapportionment and its continuing right to deference with respect to the exercise of this right by expressly characterizing the 1992 Alabama Redistricting Plan as an "interim" plan. The district court made it clear that a reapportionment plan adopted by the state legislature could replace the federal court plan at any time, as long as said legislative plan was precleared by the Department of Justice as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in time for the election process "to proceed without delay," *Wesch v. Hunt*, 785 F. Supp. 1491, 1501 (S.D. Ala. 1992). The district court even provided that a plan by the legislature would be allowed to supersede the district court's interim plan for the 1992 elections, as long as it was ready "one week before the statutory deadline for candidates to qualify." *Id.* at 1501. Unquestionably, the district court recognized that it had adopted a "back-up" plan only, and that a valid state legislative plan could replace a federal court plan at any time.

The courts below erred by failing to recognize that a reapportionment plan fashioned by the state judiciary also should supersede a federal court plan at any time. As petitioners have pointed out, the decisions of the courts below erroneously limit the state judiciary's "window of

opportunity" for adopting a reapportionment plan to a "one-time" opportunity *before* a federal court plan is implemented. (Petition for Writ of Certiorari at 12.) By limiting the adoption of a state court reapportionment plan to instances in which the federal court has not yet adopted an interim plan, the courts below directly challenge the principal proposition in *Growe* and fail to acknowledge that this court has specifically "encouraged" the state judiciary to be involved in the reapportionment process. See: *Growe* at 1081; *Scott* at 409.

The disparate treatment of the state legislature and the state judiciary by the courts below, with respect to *when* the federal court must defer to a state's efforts to adopt its own valid redistricting plan, reflects a tension between the federal judiciary and the state judiciary that adherence to the correct meaning of *Growe* would avoid. This tension is best illustrated by references in the decision of the court of appeals that suggest that state court redistricting lawsuits such as the instant case, if allowed to proceed, would "strip all federal courts of the ability to meaningfully redistrict" (Petition for Writ of Certiorari app. at 14-a), and "oust and replace the federal court plan" (Petition for Writ of Certiorari app. at 13-a). Efforts by the state legislature to replace the federal court plan with a state legislative plan would not be characterized as "stripping" the federal court of the power to redistrict, nor would the replacement of a federal court plan by a legislative plan be considered "ousting" the federal court plan.

The tension between the federal and state judiciary with respect to redistricting also is evidenced by the reference in the decision of the court of appeals to the "great deal of time and other resources" expended by the district court in adopting the 1992 Alabama Redistricting Plan. (Petition for Writ of Certiorari app. at 13-a.) The expense of time and resources by the district court would not be raised by the court of appeals if the state legisla-

ture were the branch of the state endeavoring to adopt a plan to supplant the federal court interim plan. Furthermore, although the time and other resources invested by the district court are not relevant to the issues presented herein, it is important to point out that said time and resources were appropriately invested and will not have been wasted if a state court plan is used in the 1994 elections. The 1992 Alabama Redistricting Plan was implemented in the 1992 elections and should serve as a "back-up" plan for the remainder of the decade.

II. THE ADOPTION OF AN INTERIM REAPPORTIONMENT PLAN BY A FEDERAL COURT DUE TO THE FAILURE OF THE STATE TO ADOPT A VALID PLAN IN TIME FOR AN IMPENDING ELECTION, DOES NOT BAR THE STATE JUDICIARY FROM ADOPTING A VALID CONGRESSIONAL REAPPORTIONMENT PLAN FOR A SUBSEQUENT ELECTION.

The reapportionment lawsuit in Alabama state court, *Sinkfield v. Bennett*, No. 93-689 (Cir. Ct. Montg. Co., Ala., amended complaint filed April 7, 1993), provides an opportunity for a branch of the state to fulfill the state's continuing constitutional duty to "apportion representation," See Opinion of the Justices, 254 Ala. 185, 186, 47 So. 2d 714, 716 (1950). Therefore, the interim plan adopted by the district court with "great reluctance," *Wesch* at 1497, due to the state's failure to adopt a plan in time for the 1992 elections, should not serve as a bar to efforts by said state court to adopt a reapportionment plan for the 1994 elections.

The court of appeals affirmed the judgment of the district court, which enjoined the *Sinkfield* proceedings, primarily on the basis that the "district court's injunction was necessary both in aid of its jurisdiction and to protect and effectuate its prior judgment." (Petition for Writ of Certiorari app. at 12-a.) The court of appeals explained the basis of the district court's injunction as follows:

> The district court here based its injunction on the long recognized power of courts of equity to effectuate their decrees by injunctions or writs of assistance and thereby avoid relitigation of questions once settled between the same parties. (Petition for Writ of Certiorari app. at 10-a.)

Essentially, the courts below determined that the issue before the state court had already been settled and, therefore, the state court proceeding should be enjoined. The courts below erred, however, because the issue of reapportionment was never settled by the district court. Unlike most lawsuits, the congressional redistricting lawsuit tried by the district court in *Wesch* resulted in producing only an interim plan. The parties to the litigation and the district court recognized that at any time a totally different reapportionment plan adopted by the state legislature could supersede the interim plan adopted by the federal court. Neither the district court nor the parties were ever under the illusion that the issue of congressional reapportionment was settled by the conclusion of the lawsuit. Consequently, traditional arguments based on res judicata theories are inapplicable in this instance. Even the court of appeals acknowledged that the application of res judicata to congressional redistricting cases presents a "thorny" question. (Petition for Writ of Certiorari app. at 16-a.)

The court of appeals also based its decision to affirm the judgment of the district court on the theory that the state court was attempting to institute "redistricting at will." (Petition for Writ of Certiorari app. at 14-a.) This concern fails to recognize the competency and power of the state judiciary to protect the election process and the judicial process. Certainly Alabama's judiciary, like the district court in *Wesch*, is competent "to ensure that the voters of this state have the opportunity to choose their members of congress from constitutionally drawn districts when elections are held at the time set by state law," *Wesch* at 1501. Furthermore, the Alabama judi-

ciary, like the federal judiciary, is committed to "promoting stability in elections" (Petition for Writ of Certiorari app. at 17-a), and ensuring judicial efficiency and judicial economy. Concerns by the courts below that there would be a flood of redistricting suits or that the "election process would be subject to flux at the whim of any disgruntled or disappointed voter" (Petition for Writ of Certiorari app. at 4-c), are unwarranted. Respondent Governor Folsom is confident that the Alabama judiciary is fully competent to prevent the "disarray" (Petition for Writ of Certiorari app. at 4-c), of the election process feared by the district court.

The court of appeals correctly states that "*Growe* requires deferral not abstention," (Petition for Writ of Certiorari app. at 19-a); however, the court fails to recognize that abstention is not at issue in the instant case. The district court is not being asked to abstain. It has already acted and appropriately performed its "back-up" role by adopting the 1992 Alabama Redistricting Plan in time for the 1992 elections. Under *Growe*, however, the district court should have deferred to the state court's efforts to adopt a valid congressional redistricting plan for the 1994 elections. As petitioners have properly argued:

> [A] districting plan affects voters not just once but every time there is a new election. Every time new congressional elections roll around without the State of Alabama carrying out its responsibility under both state and federal constitutions to redraw congressional districts, a new violation of the rights of Alabama's citizens occurs. (Petition for Writ of Certiorari at 14.)

Accordingly, in light of *Growe*, the 1992 interim plan adopted by the district court was not a bar to efforts by the state judiciary to adopt a valid plan for the 1994 elections, because the 1994 elections presented a new opportunity for the state to act. Therefore, the district

court should not have enjoined the state judiciary from completing its task.

CONCLUSION

Congressional reapportionment of the State of Alabama is primarily the responsibility of the State of Alabama, not the federal courts; furthermore, it is a continuing responsibility that is not obviated by the adoption of an interim plan by a federal court. In light of *Growe*, the state judiciary, as a branch of the state, must be given the same opportunities as the state legislature to adopt a valid congressional reapportionment plan to supersede the interim federal court plan. The court of appeals erred by affirming the district court's injunction and judgment enjoining the state court from adopting a valid congressional reapportionment plan to be used in the 1994 elections; therefore, Respondent Governor Folsom prays this Court will grant certiorari and reverse the judgment below.

Respectfully submitted,

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